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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1952.

No. 272

Shell Oil Company, *Petitioner,*
vs.
R. O. Wilkin; Walter E. Hocker, Jr.; Martha Hocker; F. M. Hocker, Nellie M. Scott and Carmen Gilkerson, Executrices of Estate of J. G. Scott, Deceased; Carmen Gilkerson; Nellie M. Scott; Merial Scott; John Lee Scott; Eugene A. Grubitz, 3rd; Doris Grubitz; W. R. Withington; Robert P. Singletary and W. J. Singletary, Jr., *Respondents.*

REPLY BRIEF *of* PETITIONER.

Shell purchased its three oil and gas leases (R. 19) *after* final foreclosure judgment (R. 13) and final order of confirmation (R. 18) and *before Wilkin commenced his proceeding* against the State *to vacate* the foreclosure judgments. (R. 21) Shell was not made a party to the vacation proceedings and received no notice thereof until 2½ years later. (R. 26) By that time the vacation judgment against the State had been appealed to the Supreme Court of Oklahoma (R. 26) and it was too late for Shell to intervene and contest the allegations of Wilkin's application, which the State had admitted by standing on its demurrer. (R. 34)

Question: Did Shell purchase *pendente lite?*

Corrections of Mis-statements Made by Respondents.

Respondents assert (Brief 2) that the State's mortgage became delinquent while Wilkin was in the army, whereas actually *the mortgage debt and taxes had both been in default* for more than five years when Wilkin purchased this land (R. 42) and for *more than seven years when Wilkin entered the armed forces* in 1942. Wilkin paid $25 or $50 for this land (R. 59) in 1940. (R. 11) He collected one or two years' rental (R. 78), but never paid anything on the mortgage debt or taxes. (R. 92) He was not financially able to do so. (R. 93) He made more money while in the army than he had before. (R. 93)

Respondents assert that Wilkin paid the amount due on the mortgage and taxes and refused to accept the bonuses and rentals Shell paid the State *before the case was appealed* to the Supreme Court of Oklahoma. (Brief 4) Such refusal (R. 43) and payment (R. 46) took place *after the judgment had been affirmed by the Supreme Court,* and eight months after Shell's leases had become valuable by reason of Shell's drilling activities. (R. 46-47)

Respondents assert that the State was guilty of fraud "and got found out." (Brief 13) Wilkin's vacation proceeding against the State did not raise any question of fraud, and it cannot be raised for the first time in this collateral proceeding. It is not contended that Shell participated in or knew anything about the alleged fraud. The truth of the matter is: Shell paid the State a bonus of $3420 for its three leases. (R. 23) By the time Wilkin filed his application to vacate the foreclosure judgment *these leases had decreased in value to $600.* (R. 46) It was therefore to Wilkin's advantage to ratify Shell's leases by suing the State for the $3420 bonus money. (R. 23) Three

years later, *by reason of Shell's drilling activities* (R. 46-47), the royalty payable under Shell's leases was worth $2500 an acre, or *one-half million dollars.* (R. 103) Wilkin was not satisfied with his good fortune. He waited another eight months and then attempted to revoke his ratification of Shell's oil and gas leases by refusing to accept payment of his judgment against the State for bonuses and rentals paid by Shell. (R. 43) After the risk was over, after the value of the royalty Wilkin recovered from the State had increased to one-half million dollars, and after the value of Shell's leases had increased from $600 to several hundred thousand dollars (R. 47), Wilkin and his assigns (the other respondents) attempted to revoke his ratification and cancel Shell's leases.

All emphasis supplied by us.

The State's Alleged Fraud and Shell's Status as a Purchaser in Good Faith Are Not Before the Court in This Case.

Respondents attempt to inject into this case matters which could be determined only in a direct attack on the mortgage foreclosure judgment in the state court. Wilkin could have brought an action to vacate the foreclosure judgment on the ground of fraud. *He did not do so.* Wilkin could have made Shell a party to the vacation proceedings in the state court and contended it was not a purchaser in good faith.[1] *He did not do so. Fraud was not even mentioned in the vacation proceedings, and Shell was not made a party or given notice thereof.* The present action was brought by Shell to quiet title to its oil and gas leases. It introduced in evidence the foreclosure judgment, order of

1. While not material here, *Shell was a purchaser in good faith* under the Oklahoma cases construing 12 O. S. 1941, Sec. 176. Sunray Oil Corp. v. American Royalty Petroleum Co., 203 Okl. 637, 224 P. (2d) 965. Cases cited by respondents do not involve reopenings under Section 176.

confirmation, and sheriff's deed in support of its title. (R. 103-104) These muniments of title may not be collaterally attacked in this quiet title action, either for fraud or on the ground that Shell was not a purchaser in good faith. Those questions are immaterial in this action. We concede that if Shell purchased *pendente lite* it is bound by the vacation judgment entered against the State. This would be true regardless of the alleged fraud and without regard to the question of whether Shell was a purchaser in good faith. On the other hand, *if Shell did not purchase pendente lite, the vacation judgment against the State is not binding on Shell* and the trial court properly held such judgment was not admissible in evidence against Shell in this action. (R. 116)

Even if Wilkin had vacated the judgment against the State for fraud, such vacation judgment would not have been admissible in evidence in this case as against Shell. Under Oklahoma law *the vendee of a plaintiff under a fraudulent judgment does not purchase pendente lite. Van Noy* v. *Jackson,* 68 Okl. 44, 171 Pac. 462, 463. This *pendente lite* question was not involved in *Harjo* v. *Johnston,* 187 Okl. 561, 104 P. (2d) 985, cited by respondents. Therein *the vendee was made a party to the vacation proceedings.* When a judgment is vacated under Section 176, *the fraud of the plaintiff does not affect the rights of his vendee.*[2]

12 O. S. 1941, Section 760, Is Not Applicable.

On page 8 of their brief respondents *incorrectly assert* that Wilkin's application in the state court was a proceeding under 12 O. S. A., Section 760 (12 O. S. 1941, Sec. 760), which provides for a stay of proceedings for six months in those cases where appraisement is waived in a mortgage.

2. Berkey v. Rader, 116 Okl. 258, 244 Pac. 184, 186.

They cite *Bradshaw* v. *Eudaly*, 202 Okl. 640, 217 P. (2d) 522, in support of this erroneous statement. *The Bradshaw case does not even mention Section 760.* It does not involve a sale. It involved the vacation of a quiet title judgment *under Section 176.* It holds that a proceeding to reopen *under Section 176* is "not an action at law or suit in equity * * * but is *a special proceeding.* * * *" (p. 525)[3] Neither the Oklahoma statutes nor cases provide for any court proceeding under Section 760. It is not necessary. All Section 760 does is to postpone a sale of the mortgaged premises for a period of six months. During that six-months' period the mortgage judgment may be paid off, but it is not necessary to bring any action or proceeding to pay it. All that is necessary is to make payment to the Court Clerk, thereby satisfying the judgment of record. *The right to pay the foreclosure judgment ceases upon sale of the land.* There is no right of redemption *after sale* in Oklahoma.[4] Even if a sale is prematurely made and confirmed under Section 760, the order of confirmation is merely irregular and not void.[5]

Respondents cite two cases construing state statutes providing for the redemption of real property *after sale.*[6] In the *Illinois National Bank* case the redemption action *was brought against the vendee* under a state statute providing for redemption *after sale.*[6] The *LeMaistre* case[6] involved a state statute which provided for a redemption period *after sale,* and the *vendee was made a party* to the redemption proceedings. The untenable position was taken in the *Le-*

3. This case supports our contention that *the "suit in equity" to foreclose the State's mortgage ceased to pend with final judgment,* and the "special proceeding" to reopen did not commence until the application was filed. In the interim there was no case pending. It was during this interim that Shell purchased its oil and gas leases.

4. Streets v. Stephens, (1942) 191 Okl. 289, 129 P. (2d) 848, 849.

5. Cudjo v. Harris, 119 Okl. 69, 248 Pac. 343.

6. Illinois National Bank v. Gwinn, 390 Ill. 345, 61 N. E. (2d) 249; LeMaistre v. Leffers, 333 U. S. 1.

Maistre case that 50 U. S. C. A. App., Section 525 did not apply, since title did not pass until the redemption period had run. This Court correctly held Section 525 applies to all redemption periods *after sale,* and in the *LeMaistre* case *the Florida statute provided for a redemption period after an actual sale.* The Illinois and Florida cases are not in point. *It was not necessary in either case to vacate the foreclosure judgment.* Both cases involved statutes providing for redemption *after sale.* Oklahoma does not have such a statute. The redemption portion of Section 525 of the Relief Act does not, therefore, apply to Oklahoma and other states similarly situated.

Even if Section 525 be interpreted so as to apply to the equitable right to redeem from the mortgage indebtedness *prior to sale,* it would be necessary to proceed (*as Wilkin did*) under Section 176 to vacate the foreclosure judgment and order of confirmation and to cancel the sheriff's deed before Section 525 could become effective. The question would still remain as to whether Shell purchased *pendente lite* under Section 176.

Try as they may, respondents cannot change the nature of the vacation judgment Wilkin obtained against the State. In describing such judgment the Court of Appeals said:

> "On July 22, 1948, the state court entered a judgment in the foreclosure suit, in which *it adjudged that the judgment therein be vacated, the order of confirmation be set aside,* and the *sheriff's deed cancelled;* and ordered that the State make a full and complete *accounting of* * * * *bonuses received from oil and gas leases* on the land, * * *."[7] (R. 148)

The only judgment Wilkin has against the State is a judg-

7. Note the ratification of Shell's leases by a judgment against the State for bonuses paid it by Shell. Robb v. Vos, 155 U. S. 13.

ment *vacating* the foreclosure judgment and order of confirmation and canceling the sheriff's deed under Section 176.[8] If any judgment is *res judicata* against Shell, it is this vacation judgment. This is the only judgment that respondents plead as *res judicata.* (R. 6) We therefore return to the basic question: Did Shell purchase *pendente lite?*

Shell Did Not Purchase *Pendente Lite.*

In our petition we cited Oklahoma authorities showing the Oklahoma Legislature adopted Kansas decisions holding Shell did not purchase *pendente lite.* We supported these Kansas decisions by legal principles announced by the Supreme Court of Oklahoma in construing Section 176 and by cases from Nebraska, Minnesota, and Missouri interpreting identical or similar statutes. *Respondents have not attempted to refute a single authority cited by us. They do not take issue with the binding effect of the Kansas cases.* Instead they attempt to avoid these cases by discussing fraud and the status of Shell as a purchaser in good faith, which have nothing to do with the question of whether Shell purchased *pendente lite.* Even though a vendee is not a purchaser in good faith, he is entitled to his day in court if he does not purchase *pendente lite.*[9]

Summary of Respondents' Authorities:

It is significant that respondents do not cite a single authority involving Section 176 or similar statutes from other states. Their cases all fall into the following groups:

1. Cases involving *void* judgments.[10] We concede

8. State v. Wilkin, 202 Okl. 177, 211 P. (2d) 509, held the foreclosure judgment had been vacated under Section 176. (p. 510)

9. Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.

10. Morgan v. City of Ardmore, 182 Okl. 542, 78 P. (2d) 786; Arnold v. Joines, 50 Okl. 4, 150 Pac. 130; Romig v. Gillett, 187 U. S. 111.

that a purchaser under a void judgment takes nothing by the judgment, but stands in the shoes of his vendor. *The foreclosure judgment was not void.*

2. Cases in which the vendee purchased *after service of summons and prior to final judgment,* or while the case was *on appeal.*[11] Shell did not purchase prior to the foreclosure judgment or order of confirmation, and those final judgments were not appealed. It purchased after final judgment and prior to commencement of the vacation proceedings.

3. A case in which the *vendee was made a party* to the vacation proceedings.[12] In the *Harjo* case *plaintiff's vendee did not purchase pendente lite.*[13]

4. Cases involving redemption proceedings under a statute permitting redemption *after sale.*[14] In each case the *vendee was made a party* to the redemption proceedings. *Neither of these cases involved the vacation of a judgment.*

5. Cases involving *interlocutory judgments.* These cases from Illinois and Texas are discussed on page 14 of our petition. We concede that a purchaser under an interlocutory judgment purchases *pendente lite.* However, under Oklahoma law the foreclosure judgment and order of confirmation based on publication notice were final[15] and not interlocutory judgments.

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11. Mellen v. Moline Iron Co., 131 U. S. 352; Stuart v. Coleman, 78 Okl. 81, 188 Pac. 1063; Moore v. Zelic, 338 Ill. 583, 170 N. E. 664; Brockman v. Roberts, 89 Okl. 57, 213 Pac. 545.

12. Harjo v. Johnston, 187 Okl. 561, 104 P. (2d) 985.

13. Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463.

14. LeMaistre v. Leffers, 333 U. S. 1; Illinois National Bank v. Gwinn, 390 Ill. 345, 61 N. E. (2d) 249.

15. Siddell v. McMillan, 45 Okl. 800, 146 Pac. 911.

Summary of Petitioner's Authorities:

Compare respondents' authorities with the authorities cited by petitioner, which construe Section 176, the Kansas statute prior to adoption by Oklahoma, and identical or similar statutes from other states.

1. *Cases from Kansas construing an identical statute prior to the adoption of the Oklahoma statute from that state.*[16] These cases were adopted by the Oklahoma Legislature and are binding on the Oklahoma courts.[17]

2. Oklahoma cases which necessarily hold a vendee after judgment and prior to application to reopen does not purchase *pendente lite.*[18] The *Siddell* case holds a judgment based on publication notice is a *final judgment.* The *Sunray* case holds the vendee was a purchaser in good faith. (A *pendente lite* purchaser cannot be a purchaser in good faith.[19]) The *Van Noy* case holds a vendee under a judgment later *vacated for fraud* is not a *pendente lite* purchaser. The *Blackwell* case holds the vendee under a judgment later *vacated by an infant* does not purchase *pendente lite.*

3. Cases from other states having identical or similar statutes which hold such vendee does not purchase *pendente lite.*[20] Although under the Minnesota statute the vendee in the *Aldrich* case was not a purchaser in good faith, *the court held he did not purchase pendente lite.*

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16. Howard v. Entreken, 24 Kan. 428; Pritchard v. Madren, 31 Kan. 38, 2 Pac. 691.

17. Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co., 26 Okl. 13, 108 Pac. 386, 388.

18. Siddell v. McMillan, 45 Okl. 800, 146 Pac. 911; Sunray Oil Corporation v. American Royalty Petroleum Company, 203 Okl. 637, 224 P. (2d) 965; Van Noy v. Jackson, 68 Okl. 44, 171 Pac. 462, 463; Blackwell v. McCall, 54 Okl. 96, 153 Pac. 815.

19. 12 O. S. 1941, Sec. 180.

20. Scudder v. Sargent, 15 Neb. 102, 17 N. W. 369; Jones v. Driskell, 94 Mo. 190, 7 S. W. 111; Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.

The Vacation Judgment Is Not *Res Judicata* Against Shell.

Under Point III on page 11 of their brief respondents argue that Shell was in privity with the State and that the judgment against the State was *res judicata* as to it. This is another way of saying Shell purchased *pendente lite*. They cite two cases from this Court. In *Stacy* v. *Thrasher*, 6 How. 44, this Court held that an administrator for a decedent appointed in Mississippi was not in privity with the administrator of the same decedent appointed in Louisiana. We do not know why this case was cited. *Romig* v. *Gillett*, 187 U. S. 111, arose in Oklahoma, but it is not helpful to respondents for three reasons: (1) It involved a *void judgment;* (2) the *purchaser was made a party* to the vacation proceedings; and, (3) contrary to respondents' contentions, it holds that *a purchaser under a valid judgment* based on publication notice *does not purchase pendente lite*. This Court stated that a different situation would have existed in the *Romig* case if the judgment had not been defective. (p. 117) *Harding* v. *Gillett*, 25 Okl. 199, 107 Pac. 665, involved this same void judgment after the case had been remanded by this Court. Therein the Supreme Court of Oklahoma, in interpreting the opinion of this Court in the *Romig* case, said:

> "Speaking of the rights of Harding, the court said: 'Harding as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee.' *If* the court had intended to hold that the decree of foreclosure and *the foreclosure sale were valid*, it would not have used this language, for *Harding would* • • • *not stand in the shoes of the mortgagee*, but would stand as the owner of the absolute title to the property • • •." (p. 670)

Note the language of the Supreme Court of Oklahoma: *"If the * * * decree of foreclosure and the foreclosure sale were valid, * * * Harding* (the vendee) *would * * * not stand in the shoes of the mortgagee, * * *."* The foreclosure judgment in the case at bar *was a valid judgment;*[21] Shell did not stand in the shoes of the mortgagee, and the vacation judgment is not *res judicata* against it.

Conclusion.

Since Shell did not purchase *pendente lite,* it will be deprived of its property without due process of law unless this Court grants its petition for a writ of certiorari. In addition to the effect of this erroneous decision upon Shell, it establishes the following precedents:

1. That it is not necessary for a federal court to follow decisions adopted along with a statute from another state, even though such decisions are binding on the courts of the adopting state. This question is of vital interest to every state in the Union which has adopted statutes from other states.

2. That a vendee, after final judgment and before application to reopen, purchases *pendente lite* under 12 O. S. 1941, Section 176, and is bound by a vacation judgment against his grantor obtained without his knowledge in a proceeding to which he was not a party. This question affects every landowner in Oklahoma who has heretofore or who may hereafter purchase land in reliance upon a judgment based on publication service. He may be deprived of his land by a proceeding against his grantor who may, through lack of interest or actual connivance, permit a judgment to be vacated without contest.

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21. Wise v. Davis, 132 Okl. 65, 269 Pac. 248, 252; 49 C. J. S. 842.

For these reasons, and for the reasons stated in our Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No. 272

Shell Oil Company, *Petitioner,*

vs.

R. O. Wilkin; Walter E. Hocker, Jr.; Martha Hocker; F. M. Hocker, Nellie M. Scott and Carmen Gilkerson, executrices of Estate of J. G. Scott, deceased; Carmen Gilkerson; Nellie M. Scott; Merial Scott; John Lee Scott; Eugene A. Grubitz, 3rd; Doris Grubitz; W. R. Withington; Robert P. Singletary; and W. J. Singletary, Jr., *Respondents.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF *CERTIORARI.*

Petitioner prays that this Court grant rehearing of its order of October 20, 1952, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Tenth Court of Appeals in the above entitled case as prayed for in the petition filed August 14, 1952, herein.

Statement.

The State of Oklahoma served respondent R. O. Wilkin by publication notice and foreclosed a mortgage by a judgment dated June 24, 1943. (R. 13) A sale to the State was confirmed by the court. (R. 18-19) On May 7, 1945, after the term of court and time for appeal had expired,

Shell purchased three oil and gas leases from the State. (R. 19) Eleven months later Wilkin commenced a proceeding against the State to vacate the foreclosure judgments. (R. 21) The foreclosure judgment and order of confirmation were vacated. (R. 35) *Shell was not made a party, was not served with any process, and did not enter an appearance in the vacation proceeding.* (R. 26) The trial court in this case held that since Shell was not served with process the vacation judgment against the State was not admissible in evidence against Shell. (R. 116) The Court of Appeals reversed the trial court and canceled Shell's oil and gas leases in so far as they cover Wilkin's one-half interest. (R. 143-159, 163-164)

Reason for Granting Rehearing and Issuing the Writ.

Shell was not served with process and was not afforded an opportunity to defend its property in the vacation proceeding brought by Wilkin against the State of Oklahoma. The vacation judgment did not purport to vacate the foreclosure judgment as against Shell. On the contrary, *it ordered the State to account to Wilkin for bonus money paid it by Shell for oil and gas leases.* (R. 35-36) Nevertheless, the Court of Appeals held the vacation judgment was binding on Shell and used such judgment as a basis for canceling Shell's three oil and gas leases. (R. 155) By so doing, the judgment of the Court of Appeals deprived Shell of its property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Shell's pleading properly raised this question. (R. 10)

Under the Oklahoma decisions *the only remedy* afforded a purchaser in good faith under 12 O. S. 1941, Sec. 176, is for the Court to refuse to vacate the judgment as to him.

Berkey v. *Rader*, 116 Okl. 258, 244 Pac. 184; *Sunray Oil Corp.* v. *American Royalty Petroleum Co.*, 203 Okl. 637, 224 P. (2d) 965; *Baldwin* v. *Mayor*, 188 Okl. 272, 108 P. (2d) 132. The nature of the remedy is significant, since *it is not available in a Federal court.* In *Berkey* v. *Rader* the court ordered a judgment vacated as against the plaintiff, but *refused to vacate it as against the plaintiff's vendees.* The third syllabus by the court in *Sunray Oil Corp.* v. *American Royalty Petroleum Co., supra,* so clearly states the Oklahoma law that we quote it below:

> "A defendant is entitled to have a judgment entered against him quieting title to real property, resting only upon service by publication, set aside upon application made within three years from the date of the judgment pursuant to 12 O. S. 1941, Sec. 176, provided the defendant tenders with the application a valid defense to plaintiff's action. However *the application* of the defendant *should be denied* in so far as the rights of *strangers* to the proceedings are concerned *who have in good faith* and for value acquired an interest in the subject-matter after the rendition of the judgment and before the date application is made to set aside the judgment."

The only controversy between the reopening defendant and the purchaser in the Sunray case was—shall the judgment be vacated as against the purchaser? The defendant said yes. Sunray, the purchaser, said no, I am a purchaser in good faith. The trial court vacated the judgment in its entirety, but the Supreme Court held *the judgment should not have been vacated as against Sunray.* All Oklahoma cases apply the same rule as the *Sunray* case. *The Wilkin case is the first recorded case in which a subsequent purchaser was not served with process.* Suppose the purchasers in these Oklahoma cases had not been made parties to the

vacation proceedings. Would that fact deprive them of an opportunity to show the judgments should not be vacated as against them? Shell has been denied this opportunity. How could the state court determine Shell's status and vacate the foreclosure judgments as against it when it was not a party? *Shell should not be penalized and denied its day in court because Wilkin voluntarily refrained from making it a party to the vacation proceedings.* Due process of law is not dependent upon the whim of an opposing party.

A judgment based on publication notice cannot be vacated against a purchaser in good faith. Therefore, the question of good faith *must be* determined in an action properly brought in the *same court* to vacate the judgment. Shell's good faith could not be determined in Wilkin's action against the State. The State was not interested in that issue. It was an issue that could only be determined in a proper action between Wilkin and Shell. This issue could not be determined without bringing Shell before the court whose judgment was to be vacated within the three-year statutory period. Unless and until that is done, the foreclosure judgment and order of confirmation remain in full force and effect as to the interest of Shell. These judgments are invulnerable against a collateral attack.

The state court recognized the validity of the foreclosure judgments as to Shell. That court showed conclusively that it did not intend to vacate these judgments as against Shell, by rendering judgment against Shell's grantor, the State, and in favor of Wilkin for *"a full and complete accounting of all * * * bonuses for oil and gas leases * * *" paid by Shell to the State.* (R. 35-36) How could the Court of Appeals hold the foreclosure judgments were vacated as to Shell, when in the same vacation judgment Shell's

grantor was ordered to pay Wilkin all bonuses paid by Shell for its three oil and gas leases? Wilkin would not have been entitled to these bonuses if the foreclosure judgments had been vacated as to Shell.

By determining in this collateral proceeding that the foreclosure judgments are invalid as to Shell and that its leases should be canceled, the Court of Appeals has in reality attempted to set aside the state court's foreclosure judgment and order of confirmation. This the Court of Appeals was without jurisdiction to do. *Nougue* v. *Clapp*, 101 U. S. 551. *The effect of the opinion of the Court of Appeals was to hold that Shell's leases should be canceled because it would not have prevailed in the state court on the merits if it had been afforded its day in court.* The requirements necessary to constitute due process of law are not dependent upon the merits of a case:

> "• • • To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. • • •" *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424.

The question here is not whether Shell was a purchaser in good faith, but whether the Court of Appeals could hold that the foreclosure judgments stood vacated as to Shell because it was not a purchaser in good faith when that question had never been passed upon in a direct proceeding brought against it for the purpose of vacating the foreclosure judgments. In *Blackwell* v. *McCall*, 54 Okl. 96, 153 Pac. 815, the Supreme Court of Oklahoma held that where a judgment was vacated without making a purchaser after judgment a party to the vacation proceeding the vacation judgment was not admissible in evidence against such pur-

chaser in a subsequent action brought in the same court. *The trial court cited and followed the Blackwell case.* (R. 116) The *Blackwell* case announces the law of Oklahoma and is binding on this Court. Shell was entitled to its day in court to show, if it could, that the judgment should not be vacated as against it. It has been denied this right, contrary to the due process provision of the Constitution of the United States, and contrary to the holding of this Court in *Dull* v. *Blackman,* 169 U. S. 243, quoted from and relied upon by the Supreme Court of Oklahoma in the *Blackwell* case.

In discussing this question, the Supreme Court of Kansas, in *Howard* v. *Entreken,* 24 Kan. 428, said:

> "The district court committed no error in refusing to admit in evidence the vacation of the judgment of *Abbott* v. *Smith,* or the other matters offered in rebuttal to the decree of December 9, 1868." (p. 431)

The *Howard* case involved the identical publication statute later adopted by Oklahoma. It is as binding on this Court as would be a decision of the Supreme Court of Oklahoma.

Conclusion.

Shell did not have its day in the state court, because it was not made a party and served with process. Shell has not had its day in the Federal court, because the Court of Appeals held the judgment in the state court, wherein it was not served with process, was *res judicata.* If the opinion of the Court of Appeals stands, Shell will be deprived of its oil and gas leases by reason of the vacation judgment rendered in a proceeding to which it was not made a party, without service of process, and without having been given an opportunity to be heard. Regardless of the merits of the case, the benefit of notice and a hearing before judgment

is not a matter of grace, but rather is one of the rights guaranteed by the due process provision of the Constitution of the United States. *Security Trust & S. V. Co.* v. *City of Lexington*, 203 U. S. 323, 332.

For the reasons set forth above and in the petition for writ of *certiorari*, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of *certiorari* issue to the Tenth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

.....,

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